FILE COPY

Supreme Court, U. S.
FILED
JAN 26 1940
CHARLES ELMORE CROPLEY
CLERK

No. 12

In the Supreme Court of the United States

October Term, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

APPALACHIAN ELECTRIC POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	5
1. Prior proceedings	5
2. Salient facts as to navigability	7
Specification of errors to be urged	14
Reasons for granting the writ	15
1. Constitutionality of the Power Act	16
2. Navigability of the New River	18
3. Effect upon the interests of interstate commerce	22
Conclusion	24
Appendix	25

CITATIONS

Cases:	
Appalachian Electric Power Company v. *Smith*, 4 F. Supp. 6, 67 F. (2d) 451, certiorari denied, 291 U. S. 674	7
Arizona v. *California*, 283 U. S. 423	20
Ashwander v. *Valley Authority*, 297 U. S. 288	20
The Daniel Ball, 10 Wall 557	22
Economy Light & Power Co. v. *United States*, 256 U. S. 113	20
Fox River Co. v. *Railroad Commission*, 274 U. S. 651	18
Hurley v. *Kincaid*, 285 U. S. 95	18
Léovy v. *United States*, 177 U. S. 621	21
The Montello, 20 Wall. 430	20
Oklahoma v. *Texas*, 258 U. S. 574	21
Tempel v. *United States*, 248 U. S. 121	20
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53	17
United States v. *Cress*, 243 U. S. 316	21
United States v. *Oregon*, 295 U. S. 1	21
United States v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690	17, 21
United States v. *Utah*, 283 U. S. 64	20
Statutes:	
Rivers and Harbors Act of 1899, c. 425, 30 Stat. 1121, 1151 (U. S. C., Title 33, Secs. 401, 403, 406):	
Sec. 9	3, 25
Sec. 10	25
Sec. 12	3

Statutes—Continued.

	Page
Act of June 23, 1930, c. 572, 46 Stat. 797	6
Federal Water Power Act of 1920, as amended by the Federal Power Act of 1935, c. 687, 49 Stat. 803, 838 (U. S. C., Title 16, Secs. 791–817):	
Sec. 3	3, 7, 16, 20, 26
Sec. 4	3, 27
Sec. 6	3, 29
Sec. 10	3, 4, 6, 13, 15, 16, 29
Sec. 14	4, 34
Sec. 23	4, 5, 16, 17, 22, 23, 36
Miscellaneous:	
36 Op. A. G. 355	6

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

APPALACHIAN ELECTRIC POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, affirming a decree of the United States District Court for the Western District of Virginia, dismissing petitioner's bill of complaint.

OPINIONS BELOW

The opinion of the District Court (I, 78–163)[1] is reported in 23 F. Supp. 83. The opinions of the

[1] References to the record are to the printed appendices to the parties' briefs in the court below. Roman numerals I to VII refer to the indicated volume of the Government's appendices, VIII to X to that of the respondent. Volume XI refers to the separately printed proceedings in the court below. A certified copy of the complete typewritten transcript of record has been filed with the Clerk of this Court.

Circuit Court of Appeal (XI, 3–64) have not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on November 6, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether respondent's project, a dam and hydroelectric plant constructed in New River, is in navigable waters of the United States, within the meaning of Section 9 of the Rivers and Harbors Act of 1899 and Section 3 (8) of the Federal Power Act.[2]

2. Whether respondent's project will obstruct the navigable capacity of waters of the United States within the meaning of Section 10 of the Rivers and Harbors Act of 1899 or affect the interests of interstate commerce within the meaning of Section 23 of the Federal Power Act.

3. Whether the licensing provisions of the Federal Power Act are constitutional, whether applied

---

[2] An additional question, presented for precautionary purposes only, is whether the amendments to the Federal Water Power Act of 1920 found in the Federal Power Act of 1935 are applicable to respondent's project. It is immaterial in the broad discussion of this petition whether the original sections or the amended sections be made the point of reference. In the interests of simplicity, we shall, therefore, refer simply to the "Federal Power Act."

to a project located in navigable waters, or to a project which affects interstate commerce and is located in nonnavigable waters over which Congress has jurisdiction under the commerce clause.

STATUTES INVOLVED

The pertinent provisions of the Rivers and Harbors Act of 1899, the Federal Water Power Act of 1920, and the Federal Power Act are in the record (I, 205–229; VII, 1339–1355); those most immediately involved are set out in the Appendix, *infra*, pp. 25–37. The major provisions may be summarized as follows:

Section 9 of the Rivers and Harbors Act of 1899 provides that no dam shall be built across a navigable river or other navigable water of the United States without the consent of Congress. Section 10 of that Act forbids the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States. Section 12 provides for removal of structures erected in violation of these provisions by court injunction in a suit instituted by the Attorney General.

Section 4 of the Federal Power Act provides for the issuance of a license by the Federal Power Commission for the construction of a hydroelectric dam in navigable waters of the United States, defined in Section 3 (8) of the Act, or in waters over which Congress has jurisdiction under the commerce clause. The licenses, under Section 6,

are to be issued for not more than 50 years. They shall, under Section 10, include, *inter alia*, the following conditions: the project shall be the best adapted for navigation, power development, and other beneficial uses; the project shall be maintained in good repair and operated in the interests of navigation; a specified rate of amortization shall be maintained after the twentieth year out of any excess return upon the actual investment, for the purpose of reducing the net investment; annual charges to meet its administration expenses shall be paid the United States; excessive profits, unregulated by state authority, shall be expropriated to the United States. Section 10 (i) also provides for a so-called minor part license, in which the Commission may waive the conditions in a license for a minor part of a complete project or for projects of less than 100 horsepower capacity. Under Section 14, the United States, on two years' notice, can take over any project the license for which has expired, on condition that it pay the licensee its net investment in the property (not to exceed its fair value).

Section 23 of the 1920 Act provided that persons intending to construct a dam in a stream which is not navigable waters of the United States, but over which Congress has jurisdiction under the commerce clause, may file a declaration of intention with the Commission. If investigation by the Commission shows that construction of the project will affect the interests of interstate commerce, a license under the Act is required; if it does not so

find, the construction can proceed without a license. The Federal Power Act of 1935 amended this section to make filing a declaration of intention compulsory. It also made numerous amendments to the details of the other sections which were broadly summarized above.[3].

STATEMENT

The petitioner instituted suit on May 6, 1935, to enjoin respondent from constructing or operating a dam and hydroelectric plant in the New River, just above Radford, Virginia, except under a license to be issued by the Federal Power Commission (I, 1–24). After answer and trial, the District Court entered a decree dismissing the bill (I, 170–171). The Circuit Court of Appeals affirmed, Circuit Judge Parker dissenting (XI, 3–64).

1. *Prior proceedings.*—On June 26, 1925, respondent's predecessor filed with the Commission, under Section 23 of the Federal Power Act, a Declaration of Intention (II, 1099–1100) to construct a project on New River near Radford, Virginia. The declaration in September 1926 was assigned to respondent (I, 136). On August 30, 1926, respondent filed an application for a license (II, 1134; IX, 571–572).

The Commission, after investigation and two hearings, found on June 1, 1927, that the New

[3] The Appendix, *infra*, pp. 26–37, contains a comparative print of the relevant sections, showing their wording under both the 1920 and 1935 Acts.

River, at the site of the project, was not navigable waters of the United States, but that the project would affect interests of interstate or foreign commerce and that a standard form license was required for its construction (I, 138). The respondent declined to accept such a license, but declared its willingness to accept a minor part license, containing only conditions relating to the protection of navigation. Upon request of the respondent, the question whether the Commission had the power to grant such a license was submitted to the Attorney General (I, 139), who rendered an opinion that it was within the discretionary power of the Commission; his reason was that such an interpretation of Section 10 (i) of the Act was necessary "to avoid serious questions regarding the constitutionality of the Act" (I, 140; 36 Op. A. G. 355, 361).

On April 3, 1931, the newly constituted Commission,[4] after a further hearing, reaffirmed its previous finding that the project would affect interests of interstate or foreign commerce, and denied the application for a minor-part license (I, 140). On October 12, 1932, the Commission passed a resolution in which it recited that, in order to clarify the effect of its order of April 3, 1931, and from the evidence earlier submitted, it found New River

[4] In 1930 Congress amended the Federal Water Power Act (c. 572, 46 Stat. 797), changing the Commission from an *ex officio* cabinet Commission to an independent agency of five Commissioners.

navigable waters within the definition of Section 3 of the Act (I, 141).

On June 8, 1931, respondent filed suit in the United States District Court for the Western District of Virginia to enjoin the members of the Federal Power Commission. This was ultimately dismissed for want of jurisdiction over the defendants. *Appalachian Electric Power Company* v. *Smith,* 4 F. Supp. 6, 67 F. (2d) 451 (C. C. A. 4th), certiorari denied, 291 U. S. 674.

The respondent thereupon proceeded with the construction of the dam, and the petitioner brought this suit to enjoin that construction without a license from the Federal Power Commission.

2. *Salient facts as to navigability.*[5]—The New River has its source in North Carolina and flows north through Virginia and West Virginia. There it joins the Gauley River to form the Kanawha River which flows into the Ohio River (I, 87). From the North Carolina-Virginia state line to its junction with the Gauley, a distance of 252 miles, the average slope of the New is 7.1 feet per mile (I, 88). Above Allisonia, Virginia, and below

[5] We think neither the District Court nor the majority of the Circuit Court of Appeals has fairly presented the facts in this case. However, we are in the large content to accept the basic or evidentiary facts as found by the courts below, except for occasional clarification by reference to uncontested facts of record and to instances where the majority of the court below went beyond both the findings of the District Court and the plain content of the record.

Hinton, West Virginia, the average slope is 8 feet per mile (VIII, 178) and 11 feet per mile (III, 2, 4), respectively, and the river flows over several sizable falls and turbulent rapids (I, 88–89); we do not urge that it is navigable except in the intermediate reach of 110 miles between Hinton and Allisonia (see XI, 22, 47).[6] There the average slope is 4 ¼ feet per mile (II, 613, 694; III, 2–4).[7] The river flows, characteristically, through pools of still water separated by shoals or rapids (I, 89). The volume of its flow is subject to large variation, ranging, at Radford, from a record low of 521 cubic feet per second in 1930 to an estimated record high of 155,000 second-feet in 1876, but its average flow at that point is 3,200 second-feet and there is no dispute but that the volume of water is sufficient to support navigation (I, 91).

Early exploration expeditions navigated the New River, but their accounts also describe the difficulties and portages caused by the rapids (I, 96). Commercial navigation by means of keelboats followed the Civil War (I, 96); these are flat-bottomed boats about 7 feet wide and 60 feet long, with a draft of 2 feet and capacities estimated from 2 to

---

[6] For this reason, we ask the Court to note that the more vivid descriptions of the District Court and the Circuit Court of Appeals do not relate to the stretch argued, here or in the court below, to be navigable.

[7] The District Court preferred, as an alternative phrasing of this uncontested fact, to find the slope to be "fairly uniform at from 5 to 8 feet per mile" (I, 89).

12 tons (I, 98). To facilitate their use, Congress between 1876 and 1886 appropriated a total of $112,000 for the improvement of New River by clearing channels through the shoals in order to provide at low water a channel 30 feet wide and 2 feet deep (I, 97). The work was done between Hinton, West Virginia, and Wiley's Shoals, Virginia, and between Radford and Allisonia, Virginia; although it was included in the improvement project, nothing was done on the intervening stretch. A small balance, allocated for improvement above Allisonia, was returned to the Treasury because further expenditure would be inexpedient. (I, 98.) Neither court below denied that the stretches above Hinton and Radford were navigable (I, 99–101; XI, 22–23); indeed, in 1883 there were 17 keelboats operating above Hinton and 8 above Radford (I, 100). They held, however, that the intervening 55-mile reach, from Radford to approximately the West Virginia line, was not navigable (I, 99; XI, 22–23).

But this stretch was not impossible of navigation.[8] Some 23 Government witnesses testified to

[8] The court below (XI, 22–23) in contrast to the District Court, which was silent (see I, 88–92, 99), declared the physical characteristics of this reach not conducive to navigation. Circuit Judge Parker differed (XI, 47–48). The majority opinion relied chiefly upon evidence of natural obstructions appearing in the mile-by-mile survey made in 1873 (Government Ex. 31; II, 607, 614–621) and in respondent's photographs of this section of the river (X, 17–107), the majority of which were taken at extreme low stage of water (II,

navigation on the intervening reach;[9] their evidence was corroborated by 7 witnesses for the respondent, each of whom recalled one or more instances of commercial traffic on this reach,[10] while only 3 witnesses offered by respondent could recall no traffic on that part of the river.[11] The District Court recognized that there was some keelboat traffic on this reach but yet found it nonnavigable because of the probable infrequency and irregularity of that traffic and the difficulty under which it was conducted (I, 99). It also relied upon the reports of Army engineers which stated, in general, that navigation on the river was not continuous and no attempt would be made to improve it to that

---

776–778, 788–789). It ignored: the equally formidable obstacles to easy navigation shown by the survey in the admittedly navigable stretches above Hinton and Radford (II, 614–621); respondent's photographs of the navigable reach above Radford (VI, 5–12), also taken at extreme low flow (II, 788–789); and the Government's aerial photographs showing the river at mean flow (V, 29–71).

[9] Flannagan, II, 303–6; Coleman, II, 306; Linkous, II, 310–11; Collins, II, 321–326; Webb, II, 326–330; Weiss, II, 331–32; Owen, II, 338–339; Snyder, II, 346–50; Snidow, II, 364–66; Snodgrass, II, 370–73; James, II, 377–378; Peters, II, 383–384; Skeen, II, 399; Price, II, 401–5; J. R. Smith, II, 405–11; Medley, II, 411–413; Dickinson, II, 420–25; E. M. Smith, II, 428–9; Reed, II, 436–39; Hoover, II, 447; Helvey, II, 458–60; Martin, II, 465; and Anderson, II, 469–470.

[10] Buckland, II, 759–60; Lilly, II, 760–62; Talbot, II, 764–65; Gerald, II, 766–67; Osborne, II, 773–74; Adair, VIII, 287; Knode, VIII, 317.

[11] Spangler, C. R., VIII, 266–70; Spangler, W. H., VIII, 270–77; Hundley, VIII, 330–33.

extent (I, 99, 101). The unimproved stretch between the state line and Radford, however, was paralleled by a railroad after 1883, and there was neither occasion for the admittedly difficult navigation nor intention by the engineers to undertake work less necessary than in the two stretches which were not so paralleled (I, 100, 101, 103, 104; II, 712–713).

The project will have an undoubted effect upon the navigability of the New River in the reach above Hinton (see XI, 59). While commercial navigation has virtually ceased (I, 111), there should be no dispute that New River is navigable from Hinton to Glen Lyn, Virginia.[12] The normal operation of the project, the District Court concluded, will have no appreciable adverse effect upon the navigable capacity of the Kanawha River (I, 127, 132). But the hydraulic capacity of the generators will be 9,000 second-feet while the average stream flow is only 3,200 second-feet (I, 122, 91), and the project could be operated so as to send great "power waves" down the river as a result of alternating impounding and release of water, particularly in

[12] The dissenting judge states this was proved beyond doubt (XI, 59); the majority and the District Court are vague as to whether the navigable stretch reaches into Virginia (XI, 23, 25; I, 97, 98, 101). In addition to the testimony showing that the navigable stretch reached at least to Shumate's Falls, Virginia, just below Glen Lyn (II, 383–4, 405–11, 411–13, 420–25, 428–9, 436–39, 447, 759–60, 760–62; VIII, 287), see reports of the Army engineers for the year 1882 (II, 677) and for the year 1912 (II, 700).

times of low water (I, 123–124). The District Court found, however, that even if such an operation were undertaken, there would be no substantial adverse effect upon the navigability of the Kanawha (I, 125), because the effect of the power waves would be absorbed by the London, Marmet, and Winfield dams in the Kanawha and by the Hawk's Nest and proposed Bluestone dams in the New River (I, 126–129).

The respondent's project will have an unquestioned bearing on the flood-control plans of the Government but, the District Court held, its effect is likely to be beneficial because in general any dam offering a controlled release of water helps overcome floodwaters (I, 130).

The District Court dismissed the complaint, and the court below affirmed. The decision of the majority and the opinion of the minority on the issues presented for review by this Court are:

(a) Navigable waters of the United States are interstate streams used or capable of use for valuable, substantial, and permanent commerce, capable of promoting commerce to a substantial degree in their natural and ordinary condition (XI, 13–15); at a later point the majority indicated that an actual present navigation was necessary (XI, 31); the dissenting opinion declared that no more was necessary than susceptibility to commercial use, whether or not that use was difficult, inconsiderable or had been abandoned (XI, 54–57). (b) New

River, apart from two intrastate stretches of 25 or 30 miles each, is not navigable (XI, 15–26); the dissent held the intervening stretch of 55 miles also navigable (XI, 47–54) and that in any event the stretch above Radford was navigable waters of the United States because the river traffic moved in interstate commerce over railroad connections (XI, 57–58).

(c) Normal and reasonable operation of the dam will not impair the navigability of the Kanawha or Ohio River, particularly in view of the downstream dams (XI, 26–30); the dissenting judge thought it unnecessary that Congress rely upon the self-restraint of respondent or the construction of other dams to insure the maintenance of the navigable capacity of the Kanawha (XI, 59–60). (d) The effect upon the navigable capacity of New River between Glen Lyn, Virginia, and Hinton need not be considered because that commerce has been abandoned and was nev extensive (XI, 30–31); the minority viewed the navigability of that reach as beyond question (XI, 59). (e) The dam will aid rather than interfere with the Government's flood-control program (XI, 31); the dissenting judge thought that whether the dam would aid, and the extent of any benefit, depended upon the method of its operation and that it should therefore be controlled by the Government (XI, 60–61).

(f) It is unnecessary to consider whether the economic and regulatory conditions of Section 10, other than those relating to navigation, can be imposed on projects located in navigable waters

(XI, 42); the opinion, however, implies, if it does not hold, that such conditions are invalid (XI, 14, 40). (g) Projects located in non-navigable streams can constitutionally be subjected only to conditions designed to protect navigation (XI, 43). The dissenting judge thought the constitutional power to impose other conditions clear in either case (XI, 61–63).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that New River, at the site of respondent's project and from Hinton, West Virginia, to Allisonia, Virginia, is not navigable waters of the United States.

2. In failing to hold that New River above Radford, Virginia, is navigable waters of the United States because navigation in that reach connected with interstate railroad transportation.

3. In failing to hold that New River between Hinton, West Virginia, and Glen Lyn, Virginia, is navigable waters of the United States, and that respondent's project would affect the navigable capacity of this stretch.

4. In holding, because of respondent's probable method of operation and the rectifying effect of downstream dams, that respondent's project will not affect the navigable capacity of the Kanawha or Ohio River.

5. In holding that respondent's project will aid flood-control work while failing to hold that the

project for that reason affects the interests of interstate commerce or that the extent of the aid depends upon the manner of operation.

6. In holding or implying that the license provisions of the Federal Power Act, so far as they go beyond the ontrol or protection of navigation, are unconstitutional as applied to a project located in navigable waters of the United States.

7. In holding that these license provisions are unconstitutional as applied to a project which affects the interests of interstate commerce and navigation, although located in a stream not navigable waters of the United States.

8. In holding or assuming that the case must be considered without regard to the amendments to the Federal Water Power Act of 1920 found in the Federal Power Act of 1935.

9. In affirming the decree of the District Court.

REASONS FOR GRANTING THE WRIT

The bill of complaint asks that respondent be enjoined from constructing or operating its project save under a license to be issued by the Federal Power Commission. The dam will be 130 feet high, will have a hydraulic capacity of 9,000 cubic feet per second, and will be one of the nation's larger hydroelectric plants (I, 122; XI, 44, 63). Under the decision below, respondent has been held free of the regulatory provisions provided by Section 10 for licenses issued under the Federal Power Act

and has been held immune from the recapture clause of Section 14 of the Act.

In dismissing the complaint, the courts below have erroneously decided important questions relating to the interpretation and constitutionality of the Act and have revised long-settled rules as to the test of navigable waters. A number of other issues were presented to and decided by the courts below. We think the decision of some, if not all, of these issues was erroneous. But, in the interests of confining the case to a reasonable compass, we urge as error only the three major questions discussed below.[13]

1. *Constitutionality of the Power Act.*—The decision below undertakes to hold or declare unconstitutional important provisions of the Federal Power Act. The decision that New River is not navigable water of the United States within Section 3 (8) of the Act should have made unnecessary any decision as to the constitutionality of the license conditions required by Section 10 as applied to a project located in navigable waters of the United States. Yet the majority opinion below, while undertaking to leave that question open (XI, 42), contains a plain inference (XI, 40, 14) that

---

[13] An additional question may bear upon the consideration of, or be contained within, the main questions. To err on the side of caution, we also urge specifically that this controversy is governed by the amendments to the Federal Water Power Act of 1920 contained in the Federal Power Act of 1935 (see XI, 37–38).

no conditions to the licenses can validly be imposed, except those which relate to the control of navigation. The decision that the project would not affect the interests of interstate commerce under Section 23 should similarly have made unnecessary any consideration of the license conditions as applied to a project for which a license was required under that section. Yet the majority opinion seems to have ruled squarely that the conditions relating to the recapture of the plant at the end of the license period are unconstitutional, even if the project were to be considered as affecting interstate commerce under Section 23 (XI, 43).

If the project were in navigable waters of the United States or affected interstate navigation or commerce, there would be no question of the power of Congress wholly to forbid its construction. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U. S. 690. We should have thought it clear that neither the due process clause nor the elusive concept of unconstitutional conditions would prevent Congress from withholding its prohibition and allowing the project to be constructed, but only upon the prescribed conditions. *Fox River Co.* v. *Railroad Commission*, 274 U. S. 651. And, since Congress could itself construct the project or authorize its agent to do so, it would seem evident that within the ambit of its commerce

powers it could prescribe the conditions upon which respondent could construct the project. Finally, the various regulatory provisions are well within the powers Congress could in any event exercise over a hydroelectric plant sending electricity into interstate commerce.[14]

2. *Navigability of the New River.*—On the assumption that each of the navigable stretches of the New River was wholly intrastate,[15] the court below held New River not to be navigable waters of the United States because the intervening reach of 55 miles from Radford to the Virginia-West Virginia border was nonnavigable. The court below reached this conclusion on the grounds that the evidence as to navigation over this reach was based on the recollection of aged witnesses (a ground not relied upon by the district court), that the trips could be made only in times of *unusually* high

[14] The recapture provisions of Section 14 are an arguable exception but, if they should not be thought to be included in the purely regulatory powers of Congress, apart from the license provisions, recapture would seem to point to a suit under the Tucker Act, if the property should in truth be taken 50 years in the future, rather than a present charge of unconstitutionality. Compare *Hurley* v. *Kincaid*, 285 U. S. 95.

[15] The assumption is inaccurate, since the reach above Hinton, which was plainly navigable and was improved for navigation by the Federal Government, extended for one to two miles into Virginia (VIII, 4; XI, 23, 59; see, also, note 12, *supra*, p. 11).

water,[16] and then with difficulty and danger, and that the keelboat traffic lasted for only a few years prior to the coming of the railroads (XI, 24–25). Neither the court below nor the District Court disputed the accuracy of the facts summarized by the dissenting opinion of Circuit Judge Parker[17] (XI, 48–49). These show a substantial, though doubtless irregular, commerce over this intervening reach. The critical question is whether a decision of navigability can be avoided because the interstate traffic was irregular, difficult, and had not been long continued.

---

[16] This finding, not made by the District Court, has only fugitive support in the record and is contradicted by a wealth of evidence. Only one trip was said to have been made at unusually high water (VIII, 248); the river was actually only 12 to 18 inches above mean flow (VII, 1194–5, 1198–9). On the other hand, not one of the 30 witnesses (*supra*, pp. 9–10) testified that traffic on this reach of the river took place or was possible only during periods of *unusually* high water. To the contrary, see: Collins, II, 324; Flannagan, II, 304–5; Snodgrass, II, 371–2; Peters, II, 393–5; J. R. Smith, II, 406–7, 408, 410; E. M. Smith, II, 428–9; Reed, II, 438; Buckland, VIII, 282; Knode, VIII, 317. It is true that some of these witnesses recalled that passage of the "several difficult falls" (XI, 23) was difficult and at times impossible at low stages. But this was also true of the admittedly navigable reaches prior to their improvement (Report of Chief of Engineers, II, 656). The report submitted to Congress by the War Department in 1912 stated that navigable depths of 2 feet over the controlling bars between Radford and Hinton would ordinarily be found (II, 698).

[17] His opinion contains the applicable record references, to Appendix II of appellant's brief.

The decisions of this Court make it plain that the federal waters are those which are navigable and not only those which are easily navigable. The Fox River was not non-navigable because rapids and sand bars prevented unbroken navigation. *The Montello,* 20 Wall, 430, 441–443. The Desplaines River was held navigable although it had carried no commerce for a century. *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 123; see *Arizona* v. *California,* 283 U. S. 423, 452–454. The Green, Grand, and Colorado rivers were held navigable although sand bars, rapids, high velocities, and floodwaters made their use difficult; on the Grand River the rapids had been negotiated only by lumber rafts and a 5-mile reach of the Colorado which had borne no commercial traffic whatever was nevertheless held navigable because of the similarity of its physical characteristics with those of other reaches held navigable. *United States* v. *Utah,* 283 U. S. 64, 79, 89. Although shoals, reefs, and rapids obstructed navigation, and although it was not adequately improved for commercial navigation, the Tennessee River was held navigable in *Ashwander* v. *Valley Authority,* 297 U. S. 288, 328–329; see *Tempel* v. *United States,* 248 U. S. 121, 123–124. These decisions apply *a fortiori* here, for Section 3 (8) of the Act comprehensively defines navigable waters to include all parts of streams "which either in their natural or improved condition, notwithstanding interruptions between

the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce."

The majority of the court below undertook to import additional restrictions upon what constitutes a river navigable in fact. There must, in its view, be water-borne commerce which is valuable, commonly used, and of a substantial and permanent nature (XI, 14–15, 22, 25). It cited opinions of this Court in which each of these adjectives had been used. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 699; *Leovy* v. *United States*, 177 U. S. 621; *United States* v. *Cress*, 243 U. S. 316, 321; *Oklahoma* v. *Texas*, 258 U. S. 574, 591; *United States* v. *Oregon*, 295 U. S. 1, 23. But none of these decisions related to rivers on which there had been appreciable commercial navigation;[18] adjec-

[18] In the *Rio Grande* case the navigation consisted of logs and rafts which could be floated only in times of temporary high water (174 U. S. at 699). The *Leovy* case dealt with a crevasse from the Mississippi, over which oyster fishermen sometimes traveled, but which had never been used to carry freight or passengers and which had since closed into a mere marsh (177 U. S. at 627). In *Oklahoma* v. *Texas* the Red River was shown to have sufficient water for navigation only during temporary periods of high water, and that since the cessation of all navigation the river had become even shallower (258 U. S. at 587–590). The *Oregon* case dealt with lakes which had been used only for sporadic, non-commercial boating and which frequently dried up entirely (295 U. S. at 20–23). The *Cress* case dealt with a wholly different issue.

tives culled from *dicta* cannot be accumulated to override the actual decisions of this Court.

The decision below serves to import confusion into the definition of navigable waters. Moreover, apart from the more general question, neither court below denied that New River is navigable at the site of the project, from Radford upstream for 25 miles. They found the waters not to be navigable waters of the United States simply because of the difficulties of navigation over the interstate reach downstream. But, as the dissenting opinion points out (XI, 57–58), this navigable water connects with a railroad at Radford and the water traffic, consisting principally of pigiron from upstream furnaces, was continued by railroad into interstate commerce (I, 101). The waters are therefore navigable waters of the United States for purposes, at the least, of fixing the boundaries of the regulatory powers exercised by Congress. See *The Daniel Ball*, 10 Wall. 557.

3. *Effect Upon the Interests of Interstate Commerce.*—Even if the courts below were correct in finding New River not to be navigable waters of the United States, the Commission license would be required under Section 23 of the Act if the project were found by the Commission to affect the interests of interstate commerce. The majority of the court below held that the section related only to an adverse effect on downstream navigation and that the project would have no such effect (XI, 34–43, 26–31).

But, even apart from the effect on the New River itself,[19] the project will have its effect upon the navigation upon the Kanawha and Ohio rivers. We may assume the lower courts were correct in holding as a fact that the "power waves" in the river flow, resulting from the normal operation of the dams, will be substantially dissipated before they reach the Kanawha River (I, 123–130; XI, 26–30). But each of these decisions was based, in whole or in part, upon three postulates of law; that Section 23 applies only when the effect upon downstream navigable capacity is adverse; that it applies only when the intended and probable operation of the project will interfere with downstream navigation; and that the Section is inapplicable where this effect is avoided through absorption of the waves by downstream dams. None of these propositions is correct. The differences in terminology between Section 23 and Section 10 of the Rivers and Harbors Act of 1899 show that an adverse effect upon navigable capacity is not the only condition to the operation of Section 23. And the regulatory powers granted by Congress to the Commission do not evaporate because

[19] The navigable stretch above Hinton reaches to Glen Lyn, Virginia (*supra*, p. 11). The respondents in the court below did not deny the effect upon the navigability of this stretch of the river, but denied its navigability (see XI, 59); neither the District Court nor the majority below, on the other hand, questioned the navigability of this reach of the New River (*supra*, p. 9).

the respondent proposes to operate its project in an unobjectionable manner, nor because other dams, constructed by or under the authority of the United States, will neutralize any adverse effect of the project.

The dam, in addition, will plainly affect the flood-control plans for the Ohio River and its tributaries. We need not, after the flood of 1937, demonstrate the national interest—in terms of the general welfare and in terms of interstate navigation and commerce—of flood control in the Ohio River basin. The New River is the largest single tributary of the Ohio and is subject to extreme floods (I, 91). A dam operated for flood-control purposes must have a comparatively empty reservoir; one operated for power purposes must have a comparatively full reservoir. The project of respondent, as the dissenting opinion below points out (XI, 60–61), should be subject to the control of the United States to insure adequate recognition of the flood control as well as of the power production capacities of the project.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

DAVID W. ROBINSON, JR.,
General Counsel,
Federal Power Commission.

JANUARY 1940.

APPENDIX.

The Rivers and Harbors Act of 1899, c. 425, 30 Stat. 1121, 1151 (U. S. C., Title 33, Secs. 401, 403):

SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the

waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

Federal Water Power Act of 1920, c. 285, 41 Stat. 1063, as amended by the Federal Power Act of 1935,[1] c. 687, 49 Stat. 838 (U. S. C., Title 16, Secs. 791–817):

SEC. 3. [That] The words defined in this section shall have the following meanings for the purposes of this Act, to wit:

* * * * *

(*8*) "Navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under

[1] Matter in brackets was contained in the Federal Water Power Act of 1920, but eliminated in the amendments made by the Federal Power Act of 1935; italicized matter was added by the latter act. Changes in capitalization and punctuation are, where possible, indicated by italics only.

its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids; together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

* * * * * *

SEC. 4. [That] The Commission is hereby authorized and empowered—

* * * * *

[d] (*e*) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State [,] or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power-houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation [,] and for the development, transmission, and utilization of power across, along, from or in any of the [navigable waters of the United States] *streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several* States, or upon any part of the public lands and reservations of the

United States (including Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or [of] foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: Provided further, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to [the passage of this Act] *June 10, 1920*: *And provided*

further, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection [e] (*f*) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

SEC. 6. [That] *L*icenses under this [Act] *Part* shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after [ninety] *thirty* days' public notice. *Copies of all licenses issued under the provisions of this Part and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 3743, Revised Statutes, as amended (U. S. C., title 41, sec. 20).*

* * * * *

SEC. 10. [That] All licenses issued under this [Act] *Part* shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive [scheme of] *plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce,*

for the improvement and utilization [for the purposes of navigation,] of water-power development, and [of] *for* other beneficial public uses, *including recreational purposes;* and if necessary to secure such [scheme] *plan* the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of *an installed* capacity in excess of one hundred horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory

thereto, constructed under the license, and in no event shall the United States be liable therefor.

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the [actual, legitimate] *net* investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this [Act] *Part*; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and *any* such charges [for the expropriation of excessive profits] may be adjusted from time to time by the Commission as conditions may require: Provided, That when licenses are issued in-

volving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, *subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984)*, fix a reasonable annual charge for the use thereof; and such charges may *with like approval* be readjusted *by the Commission* at the end of twenty years after the [beginning of operations] *project is available for service* and at periods of not less than ten years thereafter [in a manner to be described in each license] *upon notice and opportunity for hearing*: Provided further, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower *installed* capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall

be such as determined by the Commission. *In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.*

(f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. *The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.*

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to

be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Such other conditions not inconsistent with the provisions of this Act as the Commission may require.

(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than one hundred horsepower *installed* capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this [Act] *Part,* except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided,* That the provisions hereof shall not apply to annual charges for the use of lands within Indian reservations.

* * * * *

SEC. 14. [That] *Upon* not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power

and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken [,] plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by [agreement between] the Commission [and the licensee, and in case they can not agree, by proceedings in equity instituted by the United States in the district court of the United States in the district within which any such property may be located:] *after notice and opportunity for hearing.* [Provided, That] Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license [,] or by good will, going value, or prospective revenues; [Provided further, That] *nor shall* the values allowed for water rights, rights-of-way, lands, or interest in lands [not] be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: Provided, That the right of the United States or any State

or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

* * * * *

SEC. 23. * * *

* * * * *

(b) *It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other navigable works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act.* [That] *Any* person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce [between] *with* foreign nations and among the several States [may in their discretion] *shall before such construction* file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be

affected by such proposed construction, such person, association, corporation, State, or municipality shall not [proceed with such construction] *construct, maintain, or operate such dam or other project works* until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

U. S. GOVERNMENT PRINTING OFFICE: 1941